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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

HOUSEHOLD CREDIT SERVICES, INC.
and MBNA AMERICA BANK, N.A.,

Petitioners,

—v.—

SHARON R. PFENNIG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

In enacting the Truth in Lending Act, Congress delegated expansive authority to the Federal Reserve Board to issue implementing regulations. The Act provides that "these regulations may contain such classifications . . . as in the judgment of the Board are necessary" to effectuate the purposes of the statute. 15 U.S.C. § 1604(a). The Federal Reserve exercised this authority by promulgating Regulation Z, a provision of which has since 1981 excluded from the definition of "finance charge" any fees imposed "for exceeding a credit limit." 12 C.F.R. § 226.4(c)(2). In *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980), this Court held that the Federal Reserve's interpretations of the Truth in Lending Act are dispositive unless "demonstrably irrational." A divided panel of the Sixth Circuit nevertheless invalidated the Federal Reserve's classification of over-limit fees, holding that Regulation Z's exclusion of such fees from the finance charge conflicts with the Act's general definition of "finance charge." The question presented for review is:

> Whether the Sixth Circuit improperly substituted its interpretation of the Truth in Lending Act for that of the Federal Reserve—the agency authorized by Congress to interpret the statute—in invalidating an important provision of Regulation Z that affects tens of millions of consumer credit card agreements.

List of Parties and Rule 29.6 Statement

The caption of the case contains the names of all the parties to the proceedings before the United States Court of Appeals for the Sixth Circuit.

The parent company of petitioner Household Credit Services, Inc. is Household Finance Corporation, which is a wholly owned subsidiary of Household International, Inc. The parent company of petitioner MBNA America Bank, N.A. is MBNA Corporation. No other publicly held company owns 10% or more of the stock of either petitioner.

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OCTOBER TERM, 2002

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MBNA AMERICA BANK, N.A.,

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v.

SHARON R. PFENNIG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The Court of Appeals' opinion is reported at 295 F.3d 522 and reprinted at pages A1-23. The District Court's opinion is unreported and reprinted at pages A24-29.

Jurisdiction

The Court of Appeals entered its judgment on July 2, 2002. A timely petition for rehearing was denied on September 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute and Regulation Involved

This case involves the following provisions of the Truth in Lending Act:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. Except in the case of a mortgage referred to in section 1602(aa) of this title, these regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1604(a).

> Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges. Examples of charges which are included in the finance charge include any of the following types of charges which are applicable:
>
> (1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.
>
> (2) Service or carrying charge.
>
> (3) Loan fee, finder's fee, or similar charge.
>
> (4) Fee for an investigation or credit report.
>
> (5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

> (6) Borrower-paid mortgage broker fees, including fees paid directly to the broker or the lender (for delivery to the broker) whether such fees are paid in cash or financed.

15 U.S.C. § 1605(a).

This case also involves the following provision of Regulation Z, which implements the Truth in Lending Act:

> The following charges are not finance charges: . . .
> (2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.

12 C.F.R. § 226.4(c)(2).

Statement of the Case

A divided panel of the Sixth Circuit invalidated an important provision of Regulation Z, 12 C.F.R. Part 226, the regulations issued by the Federal Reserve to implement the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*. TILA promotes informed use of consumer credit by providing uniform disclosures to consumers about the costs and terms of credit. The decision below raises an issue of federal law that is of exceptional importance to the credit card industry, the Federal Reserve's ability to promulgate implementing regulations, and the administration of TILA nationwide. At a minimum, the Court should call for the views of the Solicitor General.

A. The Relevant Statute and Regulation

The issue in this case is whether TILA requires that over-limit fees (*i.e.*, fees imposed on credit card holders for exceeding their credit limits) be included in the "finance charge" shown on cardholders' periodic statements or be disclosed separately on such statements as "other charges." TILA generally defines a "finance charge" as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by

the creditor as an incident to the extension of credit." 15 U.S.C. § 1605(a). The statute specifies six categories of charges that must be included in the finance charge. *Id.* § 1605(a)(1)-(6). TILA is silent, however, on the precise question of whether over-limit fees must be included.

Congress delegated expansive authority to the Federal Reserve to "prescribe regulations to carry out the purposes of" TILA. *Id.* § 1604(a). "[T]hese regulations may contain such classifications, differentiations, or other provisions . . . as in the judgment of the Board are necessary or proper to effectuate the purposes" of TILA. *Id.* Pursuant to this authority, the Federal Reserve promulgated Regulation Z, which establishes uniform disclosure rules for creditors and fills in certain gaps left by TILA. Since 1981, Regulation Z has excluded from the definition of "finance charge" any fees imposed "for exceeding a credit limit." 12 C.F.R. § 226.4(c)(2). The Federal Reserve issued this regulation after notice and public comments pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* In *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980), this Court held that Federal Reserve regulations construing TILA are dispositive unless "demonstrably irrational."

B. Proceedings in the District Court

Respondent holds a credit card issued by an affiliate of petitioner Household Credit Services, Inc. and later acquired by petitioner MBNA America Bank, N.A. Petitioners charged respondent an over-limit fee for exceeding the credit limit applicable to her account. In accordance with Regulation Z, petitioners did not include this fee in the finance charge, but rather disclosed the fee separately in the section of respondent's periodic statement detailing recent account activity.

Respondent filed this action in the United States District Court for the Southern District of Ohio, seeking declaratory and injunctive relief as well as damages on behalf of a putative class of cardholders. She claims that petitioners violated TILA by not including the over-limit fee in the finance charge. The District Court had subject matter jurisdiction under 15 U.S.C. § 1640(e) and 28 U.S.C. § 1331.

Because Regulation Z expressly excludes over-limit fees from the definition of finance charge, petitioners moved to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Petitioners also argued that they are immune from damages under 15 U.S.C. § 1640(f) because they relied in good faith on Regulation Z.

The District Court dismissed the complaint, holding that "in light of the plain language of Regulation Z, the 'over-limit fee' at issue in this case is not a finance charge" under TILA. (A27) Relying on this Court's *Milhollin* decision, the court stated "that it must give deference to the Federal Reserve Board's statutory interpretation of the term finance charge." (A28) The court explained:

> Regulation Z at Section 226.4(c)(2) excludes several categories of charges, all of which arise when the terms under which the credit was extended have been breached by the borrower. These categories include the making of unanticipated late payments or the exceeding of a credit limit . . . . All of these post-credit extension occurrences are done in violation of the agreed upon terms upon which the credit was extended. Such charges are never imposed upon a borrower who simply follows the terms of the agreement. The Federal Reserve Board rationally determined that these charges, for acts amounting to breaches of the agreed upon credit extension, are not finance charges.

(A28)

C. The Court of Appeals' Decision

A divided panel of the Sixth Circuit reversed in part and affirmed in part. Over a dissent, the court held that Regula-

tion Z's exclusion of over-limit fees from the finance charge is invalid because it conflicts with TILA's general definition of "finance charge." Giving TILA "a liberal interpretation in favor of consumers" (A8), the court determined, based on respondent's allegation that petitioners "permitted her to exceed her original credit limit" (A12), that the over-limit fee in this case "was imposed incident to the extension of credit" and thus falls "within the statutory definition of the 'finance charge'" (A19). Rejecting the Federal Reserve's classification, the Sixth Circuit substituted its own highly factual test, concluding that over-limit fees must be included in the finance charge whenever a creditor "knowingly" permits the credit card holder to exceed the credit limit. (A15 n.5)

The court nevertheless concluded that petitioners are immune from damages under 15 U.S.C. § 1640(f) because they relied in good faith on Regulation Z. (A15-18) The court thus affirmed the dismissal of the complaint to the extent it seeks damages, but held that respondent may proceed with her claim for injunctive and declaratory relief. (A19)

Chief Judge Edgar of the United States District Court for the Eastern District of Tennessee, sitting by designation, dissented from the part of the opinion that invalidated the relevant provision of Regulation Z. Noting that over-limit fees "are nowhere mentioned" in TILA's definition of finance charge (A20), Judge Edgar observed that the majority had improperly substituted its interpretation of TILA for that of the Federal Reserve in contravention of *Milhollin*:

> The majority's interpretation of § 1605(a) might well be a reasonable one; but so is that of the Federal Reserve Board. Certainly it cannot be said that the Federal Reserve's exclusion of over-limit charges from the finance charge in Regulation Z is demonstrably irrational. The Federal Reserve merely filled in a blank left by Congress in the TILA . . . .

(A22)

Judge Edgar warned that the majority's decision will undermine the uniform disclosure rules created by Regulation Z: "The majority's conclusion in this case effectively amends Regulation Z in this circuit. The national uniformity established by the Federal Reserve Board for consumer credit is thereby breached." (A22-23) Judge Edgar also criticized the majority for substituting a highly fact-bound test for the bright-line classification created by Regulation Z:

> [Under the majority decision,] credit card issuers must only disclose an over-limit fee when they have been made aware that an over-limit charge is pending approval, and they then permit the charge to go through. Thus some card issuers may be required to disclose under some circumstances, while others may not. This merely adds to lack of uniformity and confusion.

(A23 n.1)

Petitioners filed a petition for rehearing. The Federal Reserve filed an *amicus* brief in support of that petition, as did the American Bankers Association, the Consumer Bankers Association, the American Financial Services Association, MasterCard International Incorporated and Visa U.S.A. Inc. These *amici* emphasized not only the conflict between the panel's decision and *Milhollin*, but also the exceptional importance of the case. The Federal Reserve stated: "This case is of exceptional importance in that the panel decision nullifies an agency rule that implements a complex statute affecting creditors and consumers nationwide. The case is likely to affect the credit card industry in circumstances that are much broader than the facts cited by the panel majority." (A43) The other *amici* stressed: "The decision, if allowed to stand, will have an enormous impact on the credit card industry . . . ."

In explaining why it classified over-limit fees as not part of the finance charge, the Federal Reserve stated: "The Board's rule excluding over-limit fees from the finance

charge is based on the rational assumption that the fees are imposed when the consumer uses the credit plan in a manner that violates the terms of the plan." (A46) "Based on the rule, consumers can use uniform disclosures to compare the cost of credit card programs offered by different creditors that do not account for contingent costs that may be imposed under each plan for unanticipated events such as late payments or over-limit situations." (A46)

The Federal Reserve also stated that the Sixth Circuit's interpretation of TILA was predicated on a misunderstanding of the operation of the credit card system:

> [T]he panel majority erred in assuming that merely because the creditor allegedly authorized a proposed credit transaction that ultimately contributed to the account balance exceeding the cardholder's pre-approved credit limit, the creditor in effect had "renegotiated the [credit card] agreement" and "knowingly" agreed to extend additional credit to the cardholder in excess of the prior limit in return for the fee.

(A47-48) The Federal Reserve explained that "it cannot be determined with complete accuracy at [the time of a transaction] whether the account balance actually exceeds the credit limit." (A49) Thus, "creditors generally do not deny authorization on the mere suspicion that a transaction would cause the account balance to exceed the consumer's credit limit." (A50) They instead "typically determine whether to impose the fee only at the end of the billing cycle, when it can be determined that all charges and credits to the account establish that the consumer is in fact over the credit limit, and when other factors . . . may be taken into account." (A50)

As a matter of practice, the Federal Reserve stated, over-limit fees are imposed "only when consumers actually exceed the pre-established credit limit for some period of time, in order to impose discipline on consumer credit usage and to compensate the creditor for the added credit risk

involved." (A50) In light of this practice, the Federal Reserve has concluded that "the over-limit fee is more akin to other charges—such as late fees—that are not finance charges because they are not incident to a particular extension of credit." (A51)

According to the Federal Reserve, "the practical implications" of the Sixth Circuit's decision will be severe for credit card issuers that operate nationally:

> The panel decision, if permitted to stand, would create serious difficulties for national credit card companies that would comply with the language of Regulation Z outside of the Sixth Circuit and must comply with the separate rule adopted by the panel within the Sixth Circuit. Even within the Sixth Circuit alone, compliance could cause substantial confusion on the part of consumers, because under the rule enunciated by the panel, some over-limit fees would be included in, and disclosed as, finance charges while others would not.

(A51-52 (footnotes omitted))

The Sixth Circuit denied the petition for rehearing, expressly refusing to consider the Federal Reserve's discussion "of the actual operation of the credit card industry" or its explanation of the rationale for excluding over-limit fees from the finance charge. (A10 n.2)

Reasons for Granting the Petition

The Sixth Circuit erroneously invalidated a provision of Regulation Z. Indeed, the error below is so clear and its practical implications for the credit card industry are so severe that summary reversal is appropriate.

TILA does not address the precise question of whether over-limit fees must be included in the finance charge. In 1981, the Federal Reserve filled this gap by amending Regulation Z to exclude over-limit fees from the finance charge. TILA expressly authorizes the Federal Reserve to

make such classifications, 15 U.S.C. § 1604(a), and this Court has held that the Federal Reserve's interpretations of TILA are dispositive unless demonstrably irrational. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980).

The Sixth Circuit's decision is contrary to this Court's *Milhollin* decision, ignores the Federal Reserve's express authority to make "classifications," and conflicts with decisions of other courts of appeals broadly deferring to the Federal Reserve's interpretations of TILA.

The question presented here warrants immediate review. By effectively amending Regulation Z in the Sixth Circuit, the decision below undermines the national uniformity that Congress sought to achieve by enacting TILA and delegating expansive authority to the Federal Reserve to issue implementing regulations. Absent a ruling by this Court, creditors will be faced with conflicting disclosure obligations—one set of obligations in the Sixth Circuit and another in the rest of the country, where creditors must continue to comply with Regulation Z as written.

The Sixth Circuit's rejection of the clear and easily enforced classification established by Regulation Z also will create immediate compliance problems for creditors. Under the Sixth Circuit's rule, some over-limit fees will be included in the finance charge and others will not, depending on whether the creditor "knowingly" permitted the cardholder to exceed the credit limit. This rule will create confusion, add to the lack of uniformity, and make it more difficult for consumers to compare the costs of credit.

I. The Decision Below Is Contrary to This Court's *Milhollin* Decision and Conflicts with Decisions of Other Courts of Appeals.

In *Milhollin*, the Court held that the Federal Reserve's interpretations of TILA are dispositive unless "demonstrably irrational," an extraordinarily deferential standard. 444 U.S. at 565. Indeed, this Court recognized long ago that Congress

"delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render [TILA] effective." *Mourning* v. *Family Publ'n Serv., Inc.*, 411 U.S. 356, 365 (1973). In concluding in 1973 that the Federal Reserve had not exceeded its statutory authority in promulgating a particular provision of Regulation Z, the Court "held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." *Id.* at 371-72. Thus, "absent some obvious repugnance to the statute, the Board's regulation implementing [TILA] should be accepted by the courts." *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981).

The *Milhollin* decision discusses at length the "high degree of deference" owed to the Federal Reserve. 444 U.S. at 557. Although courts generally should be "attentive[] to the views of the administrative entity appointed to apply and enforce a statute," the Court stated that such "deference is especially appropriate in the process of interpreting the Truth in Lending Act." *Id.* at 565. The Court explained:

> Because of their complexity and variety . . . , credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit.

Id. at 559-60. In holding that the Federal Reserve's interpretations of TILA are dispositive unless "demonstrably irrational," *id.* at 565, the Court relied on several factors.

First, the Court found that jurisprudential considerations require broad deference to the Federal Reserve. The "traditional acquiescence in administrative expertise is particularly apt under TILA," the Court stated, because the Federal Reserve "has played a pivotal role in setting [the statutory] machinery in motion." *Id.* at 566 (internal quotation omit-

ted). The Court stressed that TILA "is best construed by those who gave it substance in promulgating regulations thereunder." *Id.*

Second, the Court pointed to clear evidence of congressional intent:

> Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law. Because creditors need sure guidance through the "highly technical" Truth in Lending Act, legislators have . . . acted to promote reliance on Federal Reserve Board pronouncements.

Id. (citation omitted). The Court noted that TILA's creation of immunity from damages based on reliance on the Federal Reserve's interpretations "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative." *Id.* at 567-68. The Court emphasized that judges "should honor that congressional choice" and "refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational." *Id.* at 568.

Third, the Court concluded that broad deference to the Federal Reserve is compelled by necessity: "[A] court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views." *Id.* The Court explained that fulfilling the purposes of TILA is "an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices." *Id.* at 568-69. As the Court recognized, "[a]dministrative agencies are simply better suited than courts to engage in such a process." *Id.* at 569.

Applying this standard, the Court held that the court of appeals "erred in rejecting the views" of the Federal Reserve:

> Faced with an apparent lacuna in the express prescriptions of TILA and Regulation Z, the Court of Appeals had no ground for displacing the Federal Reserve staff's expert judgment.

Id. at 570.[1]

In accordance with *Milhollin*, other courts of appeals, unlike the Sixth Circuit, have accorded a high degree of deference to the Federal Reserve's interpretations of TILA. *See, e.g.*, *Riviere* v. *Banner Chevrolet, Inc.*, 184 F.3d 457, 460 (5th Cir. 1999) ("When it enacted TILA, Congress delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit.") (internal quotation omitted); *Benion* v. *Bank One, Dayton, N.A.*, 144 F.3d 1056, 1059 (7th Cir.) ("When an activity of a technical and specialized character is comprehensively regulated by an expert agency, as consumer credit disclosures are comprehensively regulated by the Federal Reserve Board (and no one doubts that this particular agency is a repository of genuine expertise), courts should generally leave the plugging of loopholes to the agency, lest the court's reparative efforts create confusion and disrupt the regulatory scheme."), *cert. denied*, 525 U.S. 963 (1998); *Ortiz* v. *Rental Mgmt., Inc.*, 65 F.3d 335, 341 (3d Cir. 1995) ("We therefore cannot say that the Board's adoption of one of two plausible interpretations of the gap in the statute is demonstrably irrational."); *Sentinel Fed. Sav. & Loan Ass'n* v. *Office of Thrift Supervision*, 946 F.2d 85, 89 (8th Cir. 1991) ("These Supreme Court cases make it abundantly clear that Sentinel's attack on the validity of the Official Staff Commentary must fail unless Sentinel can show that the composite annual percentage rate disclosure requirement was 'demonstrably irrational.'").

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[1] *Milhollin* involved Federal Reserve staff opinions interpreting TILA and Regulation Z. The degree of deference due to provisions of Regulation Z itself, promulgated by the Federal Reserve after notice and public comments, is at least as great.

In rejecting the Federal Reserve's classification of over-limit fees, the Sixth Circuit did not find that the regulation is irrational. Nor did the court find that Congress has "directly addressed the precise question at issue." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). To the contrary, as Judge Edgar noted in his dissent, over-limit fees "are nowhere mentioned" in TILA's definition of finance charge. (A20) Faced with such legislative silence, the Sixth Circuit had no ground for displacing the Federal Reserve's expert judgment that this statutory gap should be filled by a uniform classification excluding over-limit fees from the finance charge.

Contrary to this Court's decision in *Milhollin*, the Sixth Circuit rejected the Federal Reserve's classification based on its own determination that TILA's general definition of finance charge includes over-limit fees. TILA expressly contemplates, however, that credit cards may impose, in addition to the finance charge, "other charges" that must be disclosed separately. 15 U.S.C. §§ 1637(a)(3) & (5). As a result, not every fee associated with the extension of credit is considered part of the finance charge. Under the scheme created by Congress, the Federal Reserve is responsible for providing creditors with guidance as to whether particular charges not expressly addressed by TILA are "finance charges" or "other charges." In fulfilling this responsibility, the Federal Reserve is authorized to make such "classifications" as in its judgment are necessary to effectuate the purposes of TILA. *Id.* § 1604(a).

Under Regulation Z, over-limit fees—together with other fees generally imposed for violations of the account agreement (*e.g.*, late fees and default fees)—must be disclosed upon the opening of an account and on periodic statements as "other charges." *See* 12 C.F.R. §§ 226.6(b), 226.7(h). The Federal Reserve's conclusion that over-limit fees should be disclosed separately as "other charges," and not included in the finance charge, is not irrational. The fact that both Judge

Edgar and the district court in this case determined that the Federal Reserve's interpretation of TILA is reasonable cannot be reconciled with the majority's conclusion that TILA unambiguously requires that over-limit fees be included in the finance charge. *See Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996) (noting that "it would be difficult indeed to contend that the word 'interest' in the National Bank Act is unambiguous" in light of dissenting opinions below and conflicting decision of another court).

In rejecting the Federal Reserve's statutory interpretation, the Sixth Circuit stressed that TILA "must be given a liberal interpretation in favor of consumers." (A8) This was not a legitimate basis, however, for ignoring the Federal Reserve's expert judgment about how best to protect consumers. Nor was it a legitimate basis for failing faithfully to apply the highly deferential standard of review set out in *Milhollin*. In *Ortiz*, the Third Circuit rejected a similar challenge to a provision of Regulation Z that was based on the claim that the Federal Reserve's statutory interpretation was "presumptively unreasonable because it does not have the effect of protecting consumers." 65 F.3d at 340. The Third Circuit found "no authority for the proposition that the Board must decide every conceivable question, even detailed and technical ones, in favor of expanding the scope of the TILA." *Id.* Rather, the court stated, "the Board has broad discretion to draw the lines necessary to effectuate the act." *Id.* at 340-41. The court upheld the challenged regulation because it could not "say that the Board's adoption of one of two plausible interpretations of the gap in the statute is demonstrably irrational." *Id.* at 341.

In enacting TILA, Congress sought to ensure "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U.S.C. § 1601. "[W]hat constitutes meaningful disclosure under TILA" is "exactly the sort of Board determination" to which courts "must grant a great deference

in the absence of an explicit statutory command." *Consumers Union of U.S., Inc.* v. *Fed. Reserve Bd.*, 938 F.2d 266, 270 (D.C. Cir. 1991). Here, the Federal Reserve concluded that consumers are better able to compare the costs of credit if over-limit fees are separately disclosed and not included in the finance charge. Indeed, including over-limit fees in the finance charge would often result in a sharp and potentially misleading increase in the annual percentage rate shown on periodic statements, making it *more* difficult for consumers to compare the costs of credit.

The decision below will require the Federal Reserve and creditors to engage in a series of case-specific factual inquiries to determine whether a given over-limit fee should be included in the finance charge. The Sixth Circuit's conclusion that TILA requires such case-by-case determinations flies in the face of the Federal Reserve's express statutory authority to make "classifications" necessary to effectuate the purposes of TILA. 15 U.S.C. § 1604(a). The Federal Reserve concluded that a uniform classification of over-limit fees (and other fees generally imposed when the consumer violates the terms of the credit plan) as other charges, and not finance charges, best serves the purposes of TILA.[2]

The Sixth Circuit rejected the Federal Reserve's classification based on a misunderstanding of how the credit card system works. In denying a petition for rehearing, the Sixth Circuit expressly refused to consider the Federal Reserve's discussion "of the actual operation of the credit card industry." (A10 n.2) By disregarding the views of the Federal Reserve and trying to chart its own "course to the Act's purposes," the Sixth Circuit "embark[ed] upon a voyage without a compass." *Milhollin*, 444 U.S. at 568. As this Court has observed, "the judgments about the way the

[2] The legislative history of TILA recognizes that over-limit fees generally "accrue for misuse of the account." S. REP. NO. 100-259, at 6 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3936, 3942.

real world works that have gone into the [agency's interpretation of the statute] are precisely the kind that agencies are better equipped to make than are courts. *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 651 (1990).

II. The Question Presented Is Important and Warrants Immediate Review by This Court.

As leading commentators have noted, issues involving "the validity of agency regulations under the statutes pursuant to which they were promulgated" are often sufficiently important to warrant this Court's review. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.13, at 248 (8th ed. 2002). In fact, this Court has granted certiorari in numerous cases involving the validity of agency rules or regulations, even in the absence of a direct conflict among the circuits. *See, e.g., Pub. Lands Council* v. *Babbitt*, 529 U.S. 728, 739 (2000) (reviewing decision that sustained regulations promulgated by the Secretary of Interior under the 1934 Taylor Grazing Act); *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 375-77 (1999) (reviewing decision that invalidated Federal Communications Commission rules under the Telecommunications Act of 1996).

The Sixth Circuit's decision raises just such an important issue. Moreover, allowing this decision to stand will have immediate deleterious consequences for both creditors and consumers. This Court thus should grant certiorari now without waiting for a more pronounced circuit split to emerge.

First, the decision below creates serious regulatory and compliance problems for the Federal Reserve and the credit card industry because it creates conflicting disclosure obligations. As Judge Edgar noted, "[t]he majority's conclusion in this case effectively amends Regulation Z in this circuit. The national uniformity established by the Federal Reserve Board for consumer credit is thereby breached." (A22-23) The Federal Reserve underscored this problem in its *amicus* brief below: "The panel decision, if permitted to stand, would

create serious difficulties for national credit card companies that would comply with the language of Regulation Z outside of the Sixth Circuit and must comply with the separate rule adopted by the panel within the Sixth Circuit." (A51)[3] According to the Federal Reserve, these "differing and conflicting standards will apply in an area in which uniform disclosure of credit costs is of utmost importance in effectuating the purposes of the statute." (A43) Without uniform disclosures, consumers cannot effectively compare the costs of credit available to them. *See* H.R. REP. NO. 1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1975 ("[F]or uniformity of application to all affected segments of the industries concerned, a single set of comprehensive regulations should be issued."). Only review by this Court can restore the uniformity that Congress intended and that creditors and consumers require.

Second, the decision below requires the Federal Reserve to abandon its uniform classification in favor of a fact-specific test that will be difficult to apply and will create confusion among consumers. Under the Sixth Circuit rule, an over-limit fee must be included in the finance charge if "the creditor knowingly permit[ted] the credit card holder to exceed his or her credit limit." (A15 n.5) "Thus some card issuers may be required to disclose under some circumstances, while others may not." (A23 n.1) As Judge Edgar observed, "[t]his merely adds to lack of uniformity and confusion," making it more difficult for consumers to understand and compare credit terms. (A23 n.1) The Federal Reserve shared this concern:

[3] A creditor attempting to comply nationwide with the Sixth Circuit's rule would run the risk that another circuit would require it to comply with Regulation Z as written. Under such circumstances, the creditor might not be entitled to immunity from damages under 15 U.S.C. § 1640(f) based on its reliance on the Sixth Circuit's rule.

> Even within the Sixth Circuit alone, compliance could cause substantial confusion on the part of consumers, because under the rule enunciated by the panel, some over-limit fees would be included in, and disclosed as, finance charges, while others would not.

(A51-52)[4] Once again, only review by this Court can eliminate such compliance problems and consumer confusion.

The question presented is ripe for review. On remand, the focus will be whether petitioners "knowingly" permitted respondent to exceed her credit limit. Of course, the virtue of a bright-line classification is that it can be applied in a straightforward manner as a matter of law, rendering such case-specific factual inquiries unnecessary. In addition, the record developed on remand in connection with respondent's claim for injunctive and declaratory relief will relate primarily to respondent's account with petitioners and thus will be of little or no assistance to the Court in addressing the broader question of whether the Federal Reserve's classification of over-limit fees is rational, the relevant inquiry under *Milhollin*. In the meantime, petitioners and other credit card issuers must begin to implement an inconsistent system of disclosures—one in the Sixth Circuit and another elsewhere.

The petition presents an important and clear-cut issue of law. There is no reason to let the issue "percolate," particularly because the decision below is clearly incorrect under *Milhollin*. To the contrary, there are compelling reasons to grant certiorari now and summarily reverse.

[4] In the Sixth Circuit, a creditor could not simply elect to treat *all* over-limit fees as finance charges. Under the decision, such fees constitute finance charges only if the creditor "knowingly" permits the cardholder to exceed the credit limit. (A15 n.5)

Conclusion

The petition for a writ of certiorari should be granted. If the Court wishes to consider the views of the United States before acting on the petition, it should invite the Solicitor General to file an *amicus* brief.

Respectfully submitted,

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December 2, 2002

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SHARON R. PFENNIG, *Plaintiff-Appellant,*	
	No. 00-4213
v.	>
HOUSEHOLD CREDIT SERVICES, INC., AND MBNA AMERICA BANK, N.A., *Defendants-Appellees.*	

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 99-00815—Edmund A. Sargus, Jr., District Judge.

Argued: November 27, 2001

Decided and Filed: July 2, 2002

Before: CLAY and GILMAN, Circuit Judges; EDGAR, Chief District Judge*.

COUNSEL

ARGUED: Sylvia M. Antalis, MURRAY & MURRAY, Sandusky, Ohio, for Appellant. William G. Porter II, VORYS, SATER, SEYMOUR & PEASE, Columbus, Ohio, Richard C. Pepperman II, SULLIVAN & CROMWELL, New York, New York, for Appellees. **ON BRIEF:** Sylvia

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* The Honorable R. Allan Edgar, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

M. Antalis, John T. Murray, MURRAY & MURRAY, Sandusky, Ohio, for Appellant. William G. Porter II, John J. Todor, VORYS, SATER, SEYMOUR & PEASE, Columbus, Ohio, Richard C. Pepperman II, Sharon L. Nelles, SULLIVAN & CROMWELL, New York, New York, David W. Alexander, SQUIRE, SANDERS & DEMPSEY, Columbus, Ohio, for Appellees.

CLAY, J., delivered the opinion of the court, in which GILMAN, J., joined. EDGAR, D. J. (pp. 19-22), delivered a separate opinion dissenting in part and concurring in part.

AMENDED OPINION

CLAY, Circuit Judge. Plaintiff, Sharon R. Pfennig, appeals from the district court's September 1, 2000 order dismissing her complaint in which she seeks to bring a class action against Defendants, Household Credit Services, Inc. ("Household") and MBNA America Bank, N.A. ("MBNA"), for alleged violations of the federal Truth in Lending Act ("TILA" or "Act"), 15 U.S.C. § 1601, *et seq.* Plaintiff alleges that Defendants extended her credit and then charged her a fee for doing so without properly disclosing that fee as a finance charge as required by TILA. The district court dismissed Plaintiff's complaint, determining that regulations promulgated by the Federal Reserve Board ("FRB"), which exclude over-limit fees from the definition of "finance charges," barred her claims. We now **AFFIRM** in part, **REVERSE** in part, and **REMAND**.

BACKGROUND

Plaintiff holds a credit card originally issued by an affiliate of Defendant Household in 1993, but in which MBNA acquired the interest in 1998, when MBNA bought Household's credit card portfolio. Defendants originally established Plaintiff's credit limit at $2,000, and

subsequently allowed her to increase that limit when she attempted to make a purchase. That purchase pushed Plaintiff's credit limit over the originally agreed upon credit limit. Incident to extending Plaintiff's credit limit, Defendants assessed her an over-limit charge of $29.00 a month for every month her balance remained over the original limit. Plaintiff alleges that this charge was omitted from the finance charge calculation on her monthly statement, and instead was posted to her account as a new purchase or debit on which additional finance charges were calculated.

As indicated, Plaintiff seeks to bring a class action on behalf of all customers who hold or have held credit cards issued by Defendants. She alleges that Defendants' practice of imposing over-limit fees in the manner described above is pervasive. Plaintiff claims that Defendants routinely permit their customers to exceed their originally agreed upon credit limits upon request, and then impose upon them an over-limit fee for going over that limit. Plaintiff further alleges that the foregoing results in an exorbitant penalty that often amounts to an annual percentage rate of nearly sixty percent on credit extended over the limit. As a result of Defendants' alleged TILA violations, Plaintiff requests equitable relief, including a declaratory judgment that the over-limit fee is not properly disclosed pursuant to TILA (count I), and monetary damages (count II).

As further explained below, the district court dismissed Plaintiff's complaint on Defendants' motion for failure to state a claim under Fed. R. Civ. P. 12(b)(6) because the administrative regulations interpreting TILA (hereinafter "Regulation Z") expressly exclude fees charged for exceeding a credit limit from the definition of the "finance charge."

DISCUSSION

I.

This Court reviews *de novo* a district court's dismissal of a complaint under Rule 12(b)(6). *Hammonds v. Norfolk S. Corp.*, 156 F.3d 701, 704 (6th Cir. 1998) (citing *Merriweather v. City of Memphis*, 107 F.3d 396,398 (6th Cir. 1997)). On such a motion, the Court accepts as true well-pleaded facts alleged in the complaint, and will dismiss the complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle him or her to relief. *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 561 (6th Cir. 1998) (citing *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996)). All allegations must be construed in the light most favorable to the plaintiff. *Mertik v. Blalock*, 983 F.2d 1353, 1355 (6th Cir. 1993).

II.

Plaintiff argues that the plain language of TILA mandates that Defendants include as a finance charge the monthly fee imposed on Plaintiff's monthly statement for exceeding her credit limit. She admits that Regulation Z, promulgated by the FRB, has excluded from the definition of the term "finance charge" fees imposed for exceeding a credit limit. However, she argues that the regulation conflicts with the plain language of the statute, and in such cases, the Supreme Court has held that courts must ignore the regulation so as to give effect to the statute. She further contends that TILA is a consumer protection statute and must be construed liberally so as to prevent the type of action in which Defendants are now engaged.

Defendants contend that the district court properly dismissed Plaintiff's complaint because Regulation Z excludes over-limit fees from the definition of finance charge. They argue that Regulation Z's exclusion of over-limit fees from the definition of the finance charge is

rationally based and not contrary to TILA, and that the Supreme Court and this Court have stressed that courts should defer to the FRB's interpretations of TILA. Finally, Defendants claim that they acted in good faith compliance with Regulation Z when they failed to disclose the over-limit fee as a finance charge, and that pursuant to 15 U.S.C. § 1640(f), they are therefore immune from civil liability in the instant action.

III.

The purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare . . . the various credit terms available to him and avoid the uninformed use of credit and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1989) (explaining that TILA's purpose is to assure "meaningful disclosure of credit terms to consumers"); *Begala v. Ohio, Nat'l Ass'n*, 163 F.3d 948, 950 (6th Cir. 1999) (holding that TILA "was enacted to promote the informed use of credit by consumers by requiring meaningful disclosure of credit terms") (citation omitted). Because of TILA's purpose of protecting consumers in credit transactions, this Court has held that the statute must be construed liberally in the consumer's favor. *See Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037, 1040 (6th Cir. 1984) ("TILA is a remedial statute and should be construed liberally in favor of the consumer.") (citations omitted).

TILA, however, is not exhaustive. Congress delegated to the FRB the authority "to elaborate and expand the legal framework governing the commerce in credit." *Milhollin*, 444 U.S. at 567 ("Congress has specifically designated the Federal Reserve Board . . . as the primary source for interpretation and application of the truth-in-lending law."); *see also* 15 U.S.C. § 1604(a) (explaining that the FRB "shall prescribe regulations to carry out the purposes of this

subchapter"). The Supreme Court has recognized that TILA is a highly technical act and that deference should be given to the FRB's interpretation of the Act as long as such interpretations are not irrational. *Milhollin*, 444 U.S. at 568. In explaining the deference that courts should afford to the FRB's interpretation of TILA, the Court stated:

> wholly apart from jurisprudential considerations or congressional intent, deference to the . . . [FRB] is compelled by necessity; a court that tries to chart a true course to the Act's purpose embarks upon a voyage without compass when it disregards the agency's views. The concept of "meaningful disclosure" that animates TILA . . . cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between "competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload.]"

Id. (italics in the original). This Court also has stated that "in TILA actions, . . . it will defer to the regulations interpreting the Act." *Begala*, 163 F.3d at 950 (citing *Milhollin*, 444 U.S. at 565). However, while the FRB has been given broad authority in prescribing regulations to carry out the purposes of TILA, this authority is confined to efforts to "effectuate the purpose of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604(a). Thus, the FRB's authority is not without limits. *See e.g.*, *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) (holding that courts need only defer to FRB regulations that are not repugnant to TILA); *Consumers Union of the U.S., Inc. v. Fed. Reserve Bd.*, 938 F.2d 266, 272-74 (D.C. Cir. 1991) (holding that despite authority § 1604(a) grants to the FRB, remand was necessary for clarification of the rationality of regulations that conflicted with TILA disclosure requirements regarding home equity loan promotional discount rates and repayment options).

Section 1605(a) defines "finance charge" as follows:

> Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.

15 U.S.C. § 1605(a). Similar to TILA, Regulation Z defines "finance charge" as "the cost of consumer credit," including "any charge payable directly or indirectly by the consumer" and imposed by the creditor as a result of the extension of credit. 12 C.F.R. § 226.4(a) (2001). Regulation Z excludes from this definition of finance charge "[c]harges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence." 12 C.F.R. § 226.4(c)(2).[1]

Relying on *Milhollin*, the district court found that it was bound to give deference to the FRB's interpretation of the term finance charge, and dismissed Plaintiff's complaint because of Regulation Z's exclusion of over-limit fees from the definition of finance charge. The district court noted that all the categories of fees excluded from the definition of finance charge under § 226.4(c)(2) arise when the terms under which the credit was extended have been breached by

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[1] Prior to 1981, Regulation Z did not exclude charges for exceeding a credit limit from the term "finance charge." The FRB amended the regulation after Congress passed the Truth In Lending Simplification Act, Pub. L. No. 96-221, 94 Stat. 168, 168-186 (1980). *See* 35 Mass. Prac. Consumer Rights and Remedies § 161 (West 2000); Final Rule, 46 Fed. Reg. 20848, 20855 (April 7, 1981) ("[P]aragraph (c)(2) [of the current regulation] corresponds to § 226.4(c) of the [former] regulation, but adds one item to the list. The revised regulation specifically excludes charges for exceeding a credit limit from the finance charge.").

the borrower. The district court determined that "Plaintiff seeks a liberal interpretation of TILA, notwithstanding the plain language of Regulation Z." It concluded that the FRB "rationally" excluded fees for exceeding a credit limit from the definition of "finance charge" because such fees are "charges for past credit extension events that were not agreed to by the parties." According to the district court, no agreement was reached by the parties regarding customers "unilaterally exceeding their credit limit." Thus, it held that the FRB rationally had determined that because fees such as the one Plaintiff was charged in this case were only assessed where the customer breached the original terms of the credit agreement, any fees imposed incident to that breach could not be construed as finance charges.

Defendants argue that the district court was correct and that this Court must uphold the FRB's interpretation of Regulation Z because it is "rationally based." Just as the district court found, Defendants contend that the over-limit fee and all other fees excluded from the statutory definition of "finance charge" under § 226.4(c)(2) share a "common theme." Relying on language from the district court's opinion, Defendants claim,

> All of these post-credit extension occurrences are done in violation of the agreed upon terms upon which the credit was extended. Such charges are never imposed upon a borrower who simply follows the terms of the agreement. The Federal Reserve Board rationally determined that these charges, for acts amounting to breaches of the agreed upon credit extension, are not finance charges.

Defendant's Br. at 14.

We disagree with Defendants and the district court for several reasons. First, as explained above, we have held that TILA, as a remedial statute, must be given a liberal interpretation in favor of consumers in order to protect them

in credit transactions. *See Begala*, 163 F.3d at 950; *Jones*, 747 F.2d at 1040. Thus, TILA must be interpreted liberally in Plaintiff's favor in the instant case. Further, despite the language in § 226.4(c)(2) of Regulation Z, we believe the fee imposed in this case falls squarely within the statutory definition of a finance charge.

It is rudimentary that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.; see also Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988) (explaining that "[i]n determining the meaning of legislation, we must first look to the plain language of the statute itself"). "The ordinary meaning of the words used are presumed to express congressional purposes . . . ." *First Nat'l Bank of Council Bluffs v. Office of the Comptroller of the Currency*, 956 F.2d 1456, 1462-63 (8th Cir. 1992) (citation omitted). As stated previously, TILA defines the finance charge as the sum of *"all charges"* paid by the person to whom credit is extended and assessed by the creditor "as an incident to the extension of credit." 15 U.S.C. § 1605(a) (emphasis added). Plaintiff alleges that Defendants imposed the $29.00 over-limit fee after she requested and was granted additional credit. Had Defendants not granted Plaintiff's request for additional credit, which resulted in her exceeding her credit limit, they would not have imposed the over-limit fee. Thus, under a plain reading of § 1605(a) and the general rules of statutory interpretation, the $29.00 fee was imposed incident to the extension of credit to Plaintiff, and pursuant to TILA, Defendants were obligated to disclose the fee as a finance charge on her monthly statement. *See* 15 U.S.C. § 1638(a)(3) (listing the finance charge as one of the required disclosures by a creditor); 12 C.F.R. § 226.7(f) (requiring amount of finance charge to be listed on periodic statement).

Defendants fail to argue that the $29.00 fee was not imposed incident to the extension of credit, but instead vehemently contend that this Court must defer to Regulation Z.[2] We disagree. "[W]e defer to an agency's reasonable

[2] Defendants and several amici filed petitions for rehearing and suggestion for rehearing *en banc* in this case. The amici, including various industry organizations, challenge our understanding of the actual operation of the credit card industry, and in doing so, raise numerous factual issues not in the record. For instance, they raise the issue of why and when credit card issuers impose over-limit fees in the manner in which they do. We reject these arguments for two reasons. First, the particular factual issues the amici raise regarding the actual workings of the industry were never raised below and are not in the record. As a general rule, "[w]hile an amicus may offer assistance in resolving issues properly before a court, it may not raise additional issues or arguments not raised by the parties." *Cellnet Communications v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998) (citations omitted). Moreover, even had Defendants themselves raised these additional factual issues, we could not consider them on a petition for rehearing. *See White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990) (noting that this Court reviews "the case presented to the district court rather than a better case fashioned after the district court's order"); *see also Blakely v. United States*, 276 F.3d 853, 865 n.5 (6th Cir. 2002) (noting that Court would not consider evidence presented in support of the plaintiff's claim because the evidence had not been presented to the district court). Second, the arguments fail on the merits. The Federal Reserve Board (FRB) concedes in its amicus filing that there might be instances where a creditor imposes a low credit limit and routinely allows consumers to charge above that limit even after over-limit fees have been assessed. In such instances, the FRB acknowledges that the over-limit fee actually becomes an anticipated cost of the credit extension and is therefore a finance charge. In the instant case, Defendants fail to challenge Plaintiff's allegations that Defendants knowingly and routinely permit their credit-card customers to exceed their agreed upon credit limits, and then impose over-limit fees for doing so. In deciding a motion to dismiss, pursuant to

(continued. . .)

interpretation of a statute it administers unless the intent of Congress is clear." *Hamama v. I.N.S.*, 78 F.3d 233, 239 (6th Cir. 1996) (citation and internal quotation marks omitted). Where a statute and an agency regulation regarding the same matters conflict, courts must defer to the statute. *See e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (explaining that to determine whether a regulation conflicts with a statute, the starting point is the statute itself; if the statute is clear and unambiguous the matter is over and the courts and agency must give effect to Congressional intent). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Id.; United States v. Butler*, 207 F.3d 839, 847 (6th Cir. 2000) (same). As we have explained, TILA is a remedial statute that must be construed broadly in the consumer's favor. *Begala*, 163 F.3d at 950. The over-limit fee Defendants impose falls squarely within the statutory definition of a finance charge. *See* 15 U.S.C. § 1605(a). There is no ambiguity. Further, as is evident from other provisions of the Act, "[t]he disclosure of the finance charge is at the heart of" TILA. Elizabeth Renuart & Kathleen E. Keest, National Consumer Law Center, *Truth in Lending* § 3.1.1, at 81(4th ed. 1999). The finance charge is intended to provide an accurate price tag for credit, and TILA

(. . . continued)

Rule 12(b)(6), we must accept these allegations as true and construe them in Plaintiff's favor. *Bibbo*, 151 F.3d at 561; *Mertik*, 983 F.2d at 1355. Because we are barred from a procedural standpoint from considering the new factual issues the amici seek to bring to our attention, we deny the petitions for rehearing. It should be emphasized that while this opinion holds that Plaintiff has stated a cause of action based on the allegations in her complaint, Defendants may seek to establish on remand that Plaintiff's allegations have no factual basis and that the fees at issue in this litigation do not violate TILA.

demands that it be disclosed more conspicuously than other items. *Id.* (footnote citations omitted); *see also* 15 U.S.C. § 1632(a) (listing finance charge as one of few items that must be "disclosed *more conspicuously* than other items, data, or information. . .") (emphasis added); 15 U.S.C. § 1638(a)(3) (including the finance charge as one of the required disclosures). "Seeing the cold, hard figures [i.e., the finance charge] helps consumers to determine whether to use credit or not," as high credit costs encourage restraint. Renuart & Keest, *supra*, § 3.1.1 at 81. To that end, the failure to accurately represent the finance charge contravenes TILA's statutory goal of providing adequate disclosure in order that the consumer will knowledgeably be able to compare credit options and "avoid the uninformed use of credit."[3] 15 U.S.C. § 1601(a); *Jones*, 747 F.2d at 1040. Thus, considering the language in § 1605(a) defining the finance charge and the language and purpose of TILA as a whole, Regulation Z's exclusion of over-limit fees, such as those imposed in this case, from the "finance charge" conflicts with the express language of TILA. In such instances, the regulation cannot stand. *Cartier*, 486 U.S. at 291.

We also disagree with the district court's finding that the $29.00 fee was imposed because Plaintiff "unilaterally exceeded her credit limit." Plaintiff alleges in her complaint that Defendants permitted her to exceed her original credit limit. She further contends in her brief that the additional

[3] In addition, Plaintiff not only alleges that Defendants permit their customers to exceed their credit limits by extending additional credit to them and imposing upon them a fee for doing so, but also that Defendants "systematically" post this fee on their customers' monthly billing statements as a new purchase, on which additional finance charges are calculated. (J.A. at 7, 13 ¶¶ 9, 37). Plaintiff essentially alleges that she is incurring a double penalty, as she is assessed an over-limit fee as a penalty, and then must pay finance charges on that fee. In light of our holding, we need not address this issue.

credit was extended to allow her to make new purchases. Accepting these facts as true, Plaintiff did not unilaterally exceed her credit limit. Rather, she requested additional credit in order to make purchases. Defendants could have declined her request. Instead, they granted it, and then charged her a $29.00 fee for doing so. Plaintiff would have breached the terms of her original credit agreement but for Defendants' willingness to renegotiate the agreement. Because Defendants knowingly allowed Plaintiff to exceed her credit limit and charged her a fee incident to this extension of credit, that fee is by definition a finance charge. *See* 15 U.S.C. § 1605(a).

Moreover, despite Defendants' arguments to the contrary, we see a vast distinction between the over-limit charge at issue in this case and the other charges listed in 12 C.F.R. § 226.4(c)(2). Defendants cite several cases in which courts have held that because fees imposed for unanticipated late payment, default, or delinquency are excluded from the definition of finance charges under § 226.4(c)(2), they are not finance charges within the meaning of TILA. *See e.g.*, *United States v. Citrin*, 972 F.2d 1044, 1051(9th Cir. 1992) (holding that government did not breach TILA because it failed to "clearly inform" a scholarship recipient of the damages due upon his default; under 12 C.F.R. § 226.4(c)(2) charges for default are not finance charges); *In re Rothenberg*, 203 B.R. 827, 836 (D.C. Bankr. 1996) (same). None of the cases cited by Defendants involve the type of over-limit fee at issue in this case.[4] Further, in situations

[4] Defendants also cite to unpublished decisions to support their argument. *See Sims v. Union Planters Bank of Northeast Miss., N.A*, No. 3:96CV206-B-A, 1997 WL 170309, at *2 (N.D. Miss. Feb. 27, 1997) (dismissing plaintiff's complaint and holding that $5 fee bank charged because plaintiff's account was overdrawn was not an undisclosed finance charge because it was not a finance charge under Regulation Z); *Strutman v. Chem. Bank*, No. 94 Civ. 5013,1996 WL 539845, at *3 (S.D.N.Y. Sept. 24, 1996) (holding

(continued. . .)

where the consumer is in default, is delinquent in payment, or submits an unanticipated late payment, the lender is placed in a position of having *unexpectedly* to bear the cost of the borrower's tardiness. We find persuasive Plaintiff's argument that in such instances, "the lender is arguably at risk for failing to meet its own obligations if its customers are not meeting theirs, [and] the lender [should certainly be allowed to] impose a late fee or default fee to account for this assumed risk." Plaintiff's Br. at 14. However, the scenario is entirely different where, as here, the borrower has reached her credit limit, requests more credit, and the lender agrees to that extension of extra credit, but assesses a fee as a result. In such an instance, the fee clearly is imposed incident to the extension of credit. *See* 15 U.S.C. § 1605(a).

TILA states that the amount of the finance charge equals the sum of all charges payable by one to whom credit is extended, incident to the extension of that credit. 15 U.S.C. § 1605(a). Defendants charged Plaintiff a $29.00 over-limit

(. . . continued)
that $275 fee imposed by bank to deliver security to plaintiffs' new lender was not a finance charge because the fee was not assessed as an incident to the extension of credit). Neither of these cases involve fees for exceeding a credit limit under § 226(c)(2). Further, *Strutman* is easily distinguishable because the court in that case expressly held, and the facts of that case show, that the fee imposed was not incident to the extension of credit. *Strutman*, 1996 WL 5329845, at *3. The same holds true for *Hahn v. Hank's Ambulance Serv. Inc.*, 787 F.2d 543 (11th Cir. 1986), also cited by Defendants, where the court found persuasive the reasoning that the services rendered by an ambulance company did not result in extending credit. *Id.* at 544. In the instant case, it is unquestionable that the fee was imposed because Plaintiff was extended additional credit which caused her to exceed her originally agreed upon credit limit. In any event, the unpublished opinions cited by Defendants do not serve as binding authority on this Court. *See e.g., United States v. Barnes*, 278 F.3d 644, 648 n.1 (6th Cir. 2002).

fee after they agreed to extend her additional credit, and pursuant to TILA, that fee must be disclosed as a finance charge. 15 U.S.C. §§ 1605(a), 1638(a)(3). Further, to the extent TILA and Regulation Z conflict in this regard, the unambiguous language of TILA controls.[5]

IV.

Defendants argue that even if this Court "invalidate[s] the provision of Regulation Z at issue here," they are entitled to the good faith immunity defense of § 1640(f). In pertinent part, 15 U.S.C. § 1640(f) provides,

[5] The dissent contends that Part III of the majority opinion's rationale is problematic for two reasons: (1) Plaintiff failed to allege that Defendants had foreknowledge of her over-limit charges, and (2) credit card issuers, such as Defendants, may not in all cases decide whether over-limit charges "will be permitted to go through." The first assertion is incorrect and the second is irrelevant, in light of our holding. Plaintiff alleges that Defendants routinely permit consumers to exceed their credit limits and did so in this case as to "each and every putative class member." (J.A. at 7, ¶¶ 7-8.) She further alleges that Defendants permitted all purported class members to make the charges that allowed them to exceed their applicable credit limits. (J.A. at 13, ¶¶ 34-35.) Thus, construing the allegations in the complaint in the light most favorable to Plaintiff, she clearly alleges that Defendants had foreknowledge of her over-limit charges. In addition, these allegations support Plaintiff's argument that Defendants make the decision as to whether over-limit charges "will be permitted to go through." While the dissent claims credit card issuers "may not, in all cases" make such decisions, such a hypothetical scenario is not before us. Plaintiff has alleged in her complaint that Defendants routinely allow consumers to exceed their applicable credit limits. *Id.* Thus, she has alleged that the ultimate decision squarely rests in the hands of Defendants. Contrary to the dissent's contention, our holding is of course limited to those instances in which the creditor knowingly permits the credit card holder to exceed his or her credit limit and then imposes a fee incident to the extension of that credit.

> No provision of this section, . . . imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board . . . notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded or determined by judicial or other authority to be invalid for any reason.

Id. "This defense is available to a creditor only if he acts 'in conformity' with certain official interpretations of the Truth in Lending Act." *Cox v. First Nat'l Bank of Cincinnati*, 751 F.2d 815, 82 (6th Cir. 1985). Defendants contend that Plaintiff fails to allege that they did not act in good faith conformance with Regulation Z. Thus, Defendants assert that they are entitled to immunity under 15 U.S.C. § 1640(f). Plaintiff claims that this Court cannot consider this matter because Defendants raised it for the first time in their reply brief before the district court, which did not consider this argument. Plaintiff also contends that this Court should not entertain this argument because it raises factual issues, the resolution of which is inappropriate on the current motion. Plaintiff further argues that in addition to monetary damages, she seeks equitable relief, which is unaffected by Defendants' good faith reliance defense. *See* 15 U.S.C. § 1640(f) (relieving creditor/lender acting in good faith from liability.)

Although the district court did not expressly state in its opinion why it failed to consider Defendants' good faith argument, we note that district courts adhere to the general "well-settled" rule that "a party may not raise an issue for the first time in a reply brief." *See e.g., Books A Million, Inc. v. H & N Enters., Inc.*, 140 F. Supp. 2d 846, 859 (S.D. Ohio 2001) (citing *Aetna Cas. and Sur. Co. v. Leahey Const. Co., Inc.*, 219 F.3d 519, 545 (6th Cir. 2000)). The courts of appeal typically refrain from considering issues not passed upon by the lower courts. *See Blue Cross & Blue Shield Mut. of Ohio*

v. Blue Cross and Blue Shield Ass'n, 110 F.3d 318, 335 (6th Cir. 1997). That rule, however, is not inflexible. As we have explained:

> [t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, *as where the proper resolution is beyond any doubt*, . . . or where "injustice might otherwise result." Similarly, the Ninth Circuit has held. . . [that an appellate court has] discretion to decide whether to address an issue that the district court did not reach if the question is a purely legal one and the record has been fully developed prior to appeal; in deciding whether to exercise this discretion we should consider whether the resolution of the issue is clear and whether injustice might otherwise result.

Id. (citations omitted and emphasis added).

Because we believe that the issue regarding Defendants' good faith compliance with Regulation Z is clear in this case, we exercise our discretion to entertain their argument although it was not passed upon below.

On its face, Regulation Z expressly states that charges imposed for exceeding credit limits are excluded from the "finance charge." *See* 12 C.F.R. § 226.4(c)(2). Even assuming all allegations in Plaintiff's complaint are true and construing those allegations in the light most favorable to Plaintiff, it is undisputed that the fee at issue in this case was imposed for "exceeding a credit limit." Consequently, even if the statute required Defendants to disclose this fee as a finance charge, unequivocally Regulation Z did not. *See* 15 U.S.C. § 1640(f) (no liability for "any act done or omitted in good faith in conformity with" a FRB regulation); *Basham v.*

Fin. Am. Corp., 583 F.2d 918, 922-23 (7th Cir. 1978) (affirming dismissal and/or grant of summary judgment in favor of defendants and explaining that because defendants undisputedly complied with Regulation Z, although the Regulation conflicted with disclosure requirements under TILA, they could not, pursuant to § 1640(f), be held civilly liable for their failure to follow TILA); *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1277 at 468 (2d ed. 1990) (explaining that although general rule prevents asserting affirmative defense on a motion to dismiss, where defense is plain on its face, courts generally allow it) (footnote citations omitted). In addition, Plaintiff has not pointed to any disputed factual issue regarding whether Defendants acted in good faith by relying on the exclusionary provisions in Regulation Z. *Cf. Leon v. Washington Mut. Bank, N.A.*, 164 F. Supp. 2d 1034, 1039 (N.D. Ill. 2001) (noting that contrary to defendant's position that language contained in Rider created only an incidental interest obviating need for disclosure under TILA, two other federal courts previously had held that exact language created a security interest which did require disclosure). Based upon the undisputed facts of this case, 15 U.S.C. § 1640(f) applies, and Defendants are entitled to immunity from civil liability for failing to disclose as part of the finance charge on Plaintiffs monthly statements the fee imposed for exceeding her credit limit. We therefore affirm the dismissal of count II of Plaintiff's complaint to the extent she seeks monetary damages.[6]

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[6] Plaintiff is in no way prejudiced by our decision. Indeed, in her reply brief she states that Defendants' good faith defense should not bar her claims inasmuch as she not only seeks monetary but also equitable relief. During oral arguments, her counsel reasserted this position. However, by holding that on the facts of this case, it is beyond cavil that Defendants complied with Regulation Z and pursuant to 15 U.S.C. § 1640(f) should he afforded immunity from civil damages, we in no way imply that in

(continued. . .)

CONCLUSION

The district court erred in failing to construe TILA liberally in Plaintiff's favor and in concluding that the fee assessed Plaintiff in this case resulted from a unilateral breach on Plaintiffs' part when she exceeded her credit limit. Construing the allegations in Plaintiff's complaint in her favor, the over-limit fee was imposed incident to the extension of credit that Defendants agreed to grant Plaintiff, and therefore falls squarely within the statutory definition of the "finance charge." Nevertheless, Defendants undisputedly relied on the plain language of Regulation Z, which, although it conflicts with the plain language of TILA, expressly excludes fees charged for exceeding a credit limit from the definition of the "finance charge." Thus, pursuant to TILA, Defendants may not be held liable for damages for such omission; however, Plaintiff may proceed with her claim against Defendants for equitable relief upon remand. For the forgoing reasons, we **AFFIRM in part, REVERSE in part,** and **REMAND** the matter to the district court.

DISSENTING IN PART, CONCURRING IN PART

EDGAR, Chief District Judge, dissenting in part, concurring in part. Because I do not think that the language of the Truth in Lending Act ("TILA") necessarily warrants

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(. . . continued)

all cases where a party arguably or seemingly has complied with Regulation Z, he is entitled to the benefits of this statutory defense. *See e.g.*, *Cox*, 751 F.2d at 825 (explaining that § 1640(f) provides no protection to a creditor who honestly but mistakenly interprets Regulation Z). (citations omitted). We need not decide at this time whether other instances may arise where reliance on § 1640(f)'s good faith conformance defense would he unavailing.

the inclusion of an over-limit fee in the finance charge, I dissent from Part III of the majority opinion.

15 U.S.C. § 1605(a) generally defines a finance charge as follows:

> Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.

The statute then specifies some examples of types of charges that must be included as a part of the finance charge disclosed to consumers. Regulation Z, promulgated by the Federal Reserve Board to implement the TILA, fleshes out in considerable detail what is, and what is not, to be included within the finance charge. As the majority points out, Regulation Z clearly *excludes* from the definition of finance charge "[c]harges for actual unanticipated late payment, for *exceeding a credit limit,* or for delinquency, default, or a similar occurrence." 12 C.F.R. § 226.4(c)(2) (emphasis supplied).

The majority concludes, contrary to the Federal Reserve Board, that an over-limit fee "falls squarely within the statutory definition of a finance charge . . . . There is no ambiguity." I respectfully disagree. Over-limit fees are nowhere mentioned in § 1605(a). The majority nonetheless finds that, in accordance with the general statutory definition of finance charge, the defendant has charged a fee "incident to the extension of credit." The majority's rationale is that an over-limit fee is "imposed incident to the extension of credit" because after the plaintiff reached her credit limit, she in effect requested more credit by exceeding the limit; and by permitting her to exceed the limit and charging her a fee, the defendants imposed the fee "incident to the extension of

credit." In other words the defendants knew that the plaintiff was making charges over her limit, before allowing her to do so.

There are two problems with this rationale. First, the plaintiff does not allege in her complaint that defendants had foreknowledge of the plaintiffs over-limit charges. The majority's factual conclusion appears to be based on contentions in plaintiff's brief. Since this case was decided on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), we are limited to reviewing the facts as they appear in the complaint. *Mars v. Buckeye Rural Elec. Co-op., Inc.*, 277 F.3d 873, 877 (6th Cir. 2002); *Rose v. Hartford Underwriters Inc. Co.*, 203 F.3d 417, 420 (6th Cir. 2000). Second, the plaintiff's assertion in her brief that a credit card issuer "gets to make the decision as to whether or not [an over-limit] charge will be permitted to go through" may not, in all cases, be accurate. From our personal experience we know that many merchants check credit cards on-line before accepting customer charges. However, this may not be true in all cases; and, of course, the TILA and Regulation Z apply to all consumer credit transactions, not just those of the plaintiff.

We are admonished by the Supreme Court that:

> When a court reviews an agency's construction of the statute which it administers, . . . [and where a] court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The Supreme Court has

also specifically said that in interpreting the TILA, the Federal Reserve Board's opinions construing the Act should be dispositive unless "demonstrably irrational." *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555, 565 (1980). This circuit has held that "in TILA actions, we defer to the regulations interpreting the Act." *Begala* v. *PNC Bank, Ohio, National Ass'n*, 163 F.3d 948, 950 (6th Cir. 1998).

The majority's interpretation of § 1605(a) might well be a reasonable one; but so is that of the Federal Reserve Board. Certainly it cannot be said that the Federal Reserve's exclusion of over-limit charges from the finance charge in Regulation Z is demonstrably irrational. The Federal Reserve merely filled in a blank left by Congress in the TILA, and analogized over-limit charges to unanticipated late payments and charges for delinquency or default. These other charges are clearly not a part of the finance charge because they are, as the district court concluded, post extension of credit occurrences. The same can be reasonably said about over-limit fees.

Since the district court granted judgment to Household and MBNA on a Rule l2(b)(6) motion to dismiss, those parties found it unnecessary to bring to the attention of the district court additional facts about the handling of credit cards. The existence of these facts was made evident by briefs filed by the Federal Reserve Board and other amici in support of a petition for rehearing, which the majority has denied. Since neither the district court nor this court has had the opportunity to consider important facts bearing on the ways in which credit is extended, it is all the more inappropriate for the majority in this particular case to reach its conclusion that Regulation Z is not a permissible interpretation of the TILA.

The majority's conclusion in this case effectively amends Regulation Z in this circuit. The national uniformity

established by the Federal Reserve Board for consumer credit is thereby breached.[1] I do not think that there is a sufficient basis for this result. Of course, because the defendants relied on Regulation Z in good faith, I concur in the majority's conclusion in Part IV of its opinion that the defendants are entitled to immunity from civil liability under 15 U.S.C. § 1640(f).

I would affirm the decision of the district court in its entirety.

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[1] In its footnote 5, the majority says that it's holding is "limited to those instances in which the creditor knowingly permits the credit card holder to exceed his or her credit limit." Presumably this means that credit card issuers must only disclose an over-limit fee when they have been made aware that an over-limit charge is pending approval, and they then permit the charge to go through. Thus some card issuers may be required to disclose under some circumstances, while others may not. This merely adds to lack of uniformity and confusion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHARON R. PFENNIG,

Plaintiff,

v.

Case No. 2:99-CV-815
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Norah McCann King

HOUSEHOLD CREDIT SERVICES, INC., et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court for consideration of the Defendants' Motion to Dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Doc. #11). For the reasons that follow, the Defendants' motion is granted.

I.

Plaintiff Sharon R. Pfenning brings this action on her own behalf and on behalf of a putative class of credit card holders pursuant to the Truth in Lending Act ["TILA"], 15 U.S.C. § 1640(e), against Defendants Household Credit Services, Inc. ["Household"] and MBNA America Bank, N.A. ["MBNA"]. Plaintiff challenges the "over limit charge assessment" utilized by the Defendants. Plaintiff seeks declaratory, injunctive and monetary relief. The Court entertains this action pursuant to 28 U.S.C. §1331.

In her complaint, Plaintiff states that she is the holder of a credit card originally issued by Household and now held by MBNA. (*Complaint* at ¶5). Plaintiff avers that all putative class members who hold or have held a credit card since

1990 occupy the same status as Plaintiff. (*Id.*). Plaintiff claims that although holders of the Defendants' credit cards are subject to a credit limit on their accounts, the Defendants routinely permit consumers to exceed the applicable limit and thereupon assess an "over limit fee" of twenty nine dollars per month to the consumer. (*Id.* at ¶¶7-8). Plaintiff alleges that such fee is "systematically omitted from the finance charge calculation on the consumer's monthly billing statement" and is "systematically posted to the account as a new purchase or other debit on which additional financing charges are calculated." (*Id.* at ¶9). Plaintiff asserts that the foregoing constitutes an exorbitant penalty that often amounts to an annual percentage rate of near sixty per cent on credit extended over the credit limit. (*Id.* at ¶22).

Plaintiff seeks a declaration that the Defendants' "over limit fee" is not properly disclosed under the TILA and under Federal Reserve Board Regulation Z, 12 C.F.R. §226.4(w). The Plaintiff further asserts that she, as well as members of the putative class, have suffered actual damages as a result of the alleged nondisclosure of the over limit fee. The Defendants assert that Plaintiffs claim fails to state a basis for relief.

II.

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) "should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). All well-pleaded allegations must be taken as true and be construed most favorably toward the non-movant. *Schueer v. Rhodes*, 416 U.S. 232, 236 (1974); *Mayer v. Mylod*, 988 F.2d 635, 637 (6th Cir. 1993). While a court may not grant a Rule 12(b)(6) motion based on disbelief of a complaint's factual allegations, *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990), the Court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v.*

Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987). Consequently, a complaint will not be dismissed pursuant to Rule 12(b)(6) unless there is no law to support the claims made, the facts alleged are insufficient to state a claim, or there is an insurmountable bar on the face of the complaint.

III.

The Defendants assert that Plaintiff's claim must fail because it is contrary to the plain language of the TILA as well as Regulation Z. The stated purpose of the TILA is as follows:

> [T]o assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and to avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair billing and credit practices.

15 U.S.C. § 1601(a). The statute requires lenders to make a clear and accurate disclosure of all finance charges imposed upon consumers in a credit transaction. 15 U.S.C. § 1638(a)(3). The term "finance charge" is defined in the following manner:

> [The] sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.

15 U.S.C. §1605(a).

Plaintiff contends that the "over limit fee" assessed by the Defendants is imposed directly or indirectly by the creditor as an incident to the extension of credit and, thus, constitutes a finance charge which must be disclosed to the consumer. In opposition to this theory, the Defendants point out that Regulation Z specifically excludes charges for exceeding a credit limit from the definition of finance charge. Regulation Z provides, in relevant part:

> §266.4 Finance charge.
>
> (a) Definition. The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. . . .
>
> * * *
>
> (c) Charges excluded from the finance charge. The following charges are not finance charges:
>
> * * *
>
> (2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or similar occurrence.

12 C.F.R. §226.4(a), (c)(2).

The Defendants cite to a number of cases in which courts have held that a charge that is expressly excluded from the category of finance charges by Regulation Z, need not be disclosed to the consumer. *See e.g.*, *United States v. Citrin*, 972 F.2d 1044 (9th Cir. 1992) (holding that a default charge is not a finance charge for purposes of the TILA). Nonetheless, Plaintiff maintains that the "over limit fee" fits the definition of "finance charge" under the TILA and, furthermore, that to exclude the fee from the definition runs contrary to the legislative intent of the statute. Plaintiff seeks a liberal interpretation of the TILA, notwithstanding the plain language of Regulation Z.

This Court concludes that, in light of the plain language of Regulation Z, the "over limit fee" at issue in this case is not a finance charge subject to consumer disclosure under the TILA. While the Court is cognizant of the legislative intent of the TILA, the Court concludes that it is constrained to follow the interpretation of the statute as set forth in Regulation Z. Indeed, as the United States Supreme Court has observed, "considerable respect is due 'the interpretation

given [a] statute by the officers or agency charged with its administration.'" *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980), quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978). Thus, this Court finds that it must give deference to the Federal Reserve Board's statutory interpretation of the term finance charge. In the Court's view, when a consumer exceeds the applicable credit limit, the extension of credit thereafter is distinct from the initial agreed upon extension of credit. Therefore, the Court finds that Regulation Z's exclusion of the "over limit fee" from the definition of "finance charge" is rationally based.

Regulation Z at Section 226.4(c)(2) excludes several categories of charges, all of which arise when the terms under which the credit was extended have been breached by the borrower. These categories include the making of unanticipated late payments or the exceeding of a credit limit. Further included in these categories are charges arising after a delinquency or default. Each of the categories include charges for past credit extension events that were not agreed to by the parties. The lender agreed to loan and the borrower agreed to borrow under agreed upon terms which were "incident to the extension of credit," as that term is used in 15 U.S.C. § 1605(a). No such agreement was reached permitting unanticipated late payments, delinquency, or default. No such agreement was reached as to the borrower unilaterally exceeding the agreed upon credit limit. All of these post-credit extension occurrences are done in violation of the agreed upon terms upon which the credit was extended. Such charges are never imposed upon a borrower who simply follows the terms of the agreement. The Federal Reserve Board rationally determined that these charges, for acts amounting to breaches of the agreed upon credit extension, are not finance charges.

In sum, Plaintiffs complaint fails to state a claim upon which relief can be granted.

IV.

Defendants' Motion to Dismiss **(Doc. #11)** is **GRANTED**. This action is hereby **DISMISSED** . The Clerk is **DIRECTED** to enter Judgment accordingly.

IT IS SO ORDERED.

8-31-2000
DATE

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

00-4213

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHARON R. PFENNIG,

Plaintiff-Appellant,

v.

HOUSEHOLD CREDIT SERVICES, INC., ET AL.,

Defendants-Appellees.

ORDER

BEFORE: CLAY and GILMAN, Circuit Judges; and EDGAR,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

[9-3-2002] **Leonard Green, Clerk**

* Hon. R. Allan Edgar, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

** Judge Moore recused herself from participation in this ruling.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHARON R. PFENNIG,
2317 Waterpointe Court
Columbus, Ohio 43209

Individually and on behalf of all similarly-situated individuals

Plaintiffs,

v.

HOUSEHOLD CREDIT SERVICES INC.
c/o Corporate Trust Company
1209 Orange Street
Corporate Trust Center
Wilmington, Delaware 19801

And

MBNA AMERICA BANK, N.A.
1100 North King Street
Wilmington, Delaware 19884

Defendants.

Case No. C2-99 815

CLASS ACTION COMPLAINT

With Jury Demand
Endorsed Hereon

Now comes the named plaintiff, Sharon R. Pfennig, by and through counsel, and for her class action complaint against the defendants, Household Credit Services, Inc. and MBNA America Bank, N.A., states as follows:

PARTIES

1. The named plaintiff, Sharon R. Pfennig, is an adult individual presently residing in Columbus, Ohio. As a credit

card holder of the defendant banks, Ms. Pfennig is a "consumer" as defined by 15 U.S.C. § 1602 (h).

2. The defendant, Household Credit Services, Inc. ("Household"), is a Delaware corporation with its principal place of business in Prospect Heights, Illinois. Household is a "creditor" as defined by 15 U.S.C. § 1602 (f).

3. The defendant, MBNA America Bank, N.A. ("MBNA"), is a Delaware Corporation doing business in the State of Ohio and elsewhere throughout the United States of America. MBNA is a "creditor" as defined by 15 U.S.C. § 1602 (f).

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this Complaint pursuant to the Truth in Lending Act, 15 U.S.C. § 1640(e). Venue in this judicial district is proper as the events complained of by the named plaintiff took place in this district.

FACTUAL ALLEGATIONS

5. The named plaintiff is the holder of a credit card formerly issued or held by the defendant, Household, and now held by the defendant, MBNA. All putative class members herein as defined below hold or held a credit card issued and/or presently held by Household and/or MBNA.

6. Upon information and belief, the defendants have a uniform policy of assigning a credit limit to all credit cards issued to consumers in their normal course of business. This "credit limit" is systematically represented by and through the defendants' standardized monthly billing statement as the maximum amount of credit available to the consumer on said credit card.

7. The defendants routinely permit consumers to exceed the applicable credit limit on credit card accounts. The defendants allowed the named plaintiff and each and every

putative class member herein to exceed the "credit limit" posted for each credit card account.

8. Once the consumer is permitted to exceed his or her applicable credit limit, the defendants systematically charge the consumer an "over limit charge assessment" or "over limit fee." This fee is only imposed when additional credit is extended to the consumer over and above his or her alleged "credit limit." The fee—a fee totaling as much as twenty-nine dollars ($29.00) per month—is charged each and every month during which the consumer's balance exceeds the alleged "credit limit."

9. The "over limit charge assessment" or "over limit fee" for the additional extension of credit is systematically omitted from the finance charge calculation on the consumer's monthly billing statement. In fact, the fee is systematically posted to the account as a new purchase or other debit on which additional financing charges are calculated.

EQUITABLE TOLLING

10. Any applicable statutes of limitations have been tolled by the defendants' affirmative and intentional acts of fraudulent concealment, suppression and denial of evidence relating to the fraudulent conduct alleged herein. The named plaintiff could not reasonably have discovered the facts regarding the defendants' misconduct because of the defendants' deliberate efforts to render the named plaintiff ignorant of the fraud. In fact, upon information and belief, of the putative class remain ignorant of the fraud.

CLASS ACTION ALLEGATIONS

11. The representative plaintiff, Sharon R. Pfennig, brings this action individually and on behalf of all persons similarly situated, as members of a proposed plaintiff Class ("the Class"), defined as follows:

All consumers who were charged or assessed a fee by Household Credit Services Inc. or MBNA America Bank N.A. for exceeding the applicable credit limit on a credit card held by Household Credit Services Inc. or MBNA America Bank N.A. at any time from 1990 through the present.

The named plaintiff is a member of this putative Class. Specifically excluded from this Class are: (1) the defendants, any entity in which either defendant has a controlling interest, and the officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries, and/or assigns of any such individual or entity; and (2) any judge or judicial officer with responsibility over the management or resolution of this litigation, and members of the judicial officer's immediate family.

12. The members of the Class for whose benefit this action is brought are so numerous that joinder of all Class members is not practicable. The exact number of the Class is unknown to the representative plaintiff. However, in light of the hundreds of thousands of credit cards issued by the defendants on an annual basis, the number of putative class members is reasonably believed to be in excess of 10,000 persons.

13. The claims of the representative plaintiff are typical of, if not identical to, all members of the Class and the named plaintiff has no interest of which she is aware that is adverse or antagonistic to the interests of the Class. If the conduct of the defendants violates federal truth in lending laws as it applies to the named plaintiff, then said uniform conduct violates federal truth in lending laws with respect to the entire putative class.

14. The representative plaintiff will fairly and adequately protect the interests of the Class. The named plaintiff is committed to putting an end to the defendants' wrongful conduct. She is committed to the vigorous prosecution of this

action and, to that end, has retained competent counsel experienced in complex litigation of this nature.

15. The plaintiff Class is proper for certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The defendants' actions complained of herein are generally applicable to all Class members, thereby making final injunctive relief appropriate with respect to the Class as a whole.

16. The plaintiff Class is proper for certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The claims of the putative Class, in this regard, grow out of the same actions and policies, and rest on the same grounds, applying more or less equally to all of the members of the Class.

17. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein. Because damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impracticable for the Class to seek redress individually for the wrongs they have suffered. Members of the Class do not have a particular interest in individually controlling the prosecution of separate actions. The representative plaintiff envisions no difficulty in the management of this case as a class action. Absent a class action, the defendants will likely continue their unlawful conduct, as well as retain the millions of dollars improperly obtained from Class members through the defendants' wrongdoing.

18. There are questions of law and fact which are common to the members of the Class and which predominate over questions affecting only individual members. Common questions of law and fact include, but are not limited to, the following:

(a) Whether the defendants have a standardized procedure to charge an "over limit charge assessment" or "over limit fee" as a condition of the extension of

additional credit over and above the customer's applicable credit limit;

(b) Whether the defendants automatically include and require an "over limit charge assessment" or "over limit fee" incident to the extension of additional credit over and above the customer's applicable credit limit;

(c) Whether the defendants systematically fail to disclose this "over limit charge assessment" or "over limit fee" as part of the finance charge as required by TILA; and

(d) Whether the defendants' calculated and uniform conduct is in violation of federal truth in lending laws.

19. Notice can be provided to members of the Class by regular United States Mail since all members of the Class are known to the defendants who, either independently or through their agents, maintain a mailing list of all Class members. In addition, notice can be provided to members of the Class by publication via television, radio and/or print as necessary.

COUNT I
DECLARATORY RELIEF

20. The representative plaintiff hereby incorporates by reference all well-pleaded allegations contained in the preceding paragraphs as if fully rewritten herein.

21. The defendants knowingly allow, authorize and participate in granting customers additional credit over and above their alleged credit limits. Nonetheless, the defendants attempt to penalize these customers for the defendants' own consent to grant these customers this additional credit by charging a monthly "over limit charge assessment" or "over limit fee" that is not accurately disclosed to the customer as a cost of said credit.

22. The subject "over limit charge assessment" or "over limit fee" of twenty-nine dollars ($29.00) per month

constitutes an exorbitant penalty in that it often equates to an annual percentage rate upwards of sixty percent (60%) on the credit extended to the customer over and above the alleged credit limit. This charge is assessed in addition to the disclosed finance charge the customer is required to pay and is included in the amount on which said finance charge is calculated.

23. There exists an actual and justiciable controversy between the putative Class and the defendants as to the validity of the "over limit charge assessment" or "over limit fee" charged to the named plaintiff's account and the accounts of each putative Class member herein.

24. Substantial property rights depend upon the validity or lack thereof of this monthly assessment and the manner in which it is disclosed.

25. The named plaintiff, individually and on behalf of the putative Class, seeks a declaratory judgment against the defendants that the "over limit charge assessment" or "over limit fee" is not properly disclosed pursuant to the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*

COUNT TWO
VIOLATION OF TRUTH IN LENDING ACT

26. The representative plaintiff hereby incorporates by reference all well-pleaded allegations contained in the preceding paragraphs as if fully rewritten herein.

27. The Court has jurisdiction over the claims of the named plaintiff and the entire putative Class pursuant to 15 U.S.C. § 1640(e).

28. The Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, is a consumer protective statute designed to insure the accurate and meaningful disclosure of the true cost of credit to the consumer. *See*, 15 U.S.C. § 1601.

29. The defendants are creditors within the meaning of TILA, 15 U.S.C. § 1601 *et seq.*, and implementing the

Federal Reserve Board Regulation Z, 12 C.F.R. part 226 ("Regulation Z"), in that they enter into more than twenty-five (25) transactions per annum where credit is extended to a consumer that is repayable in more than four (4) installments.

30. The transaction of the named plaintiff and each and every putative Class member is a consumer credit transaction within the meaning of TILA and Regulation Z.

31. A "finance charge" is defined by 15 U.S.C. § 1605 (a) as follows:

> [T]he amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.
>
> * * *
>
> Examples of charges which are included in the finance charge include any of the following types of charges which are applicable:
>
> (1)Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.
>
> (2)Service or carrying charge. ***

See, 15 U.S.C. § 1605 (a).

32. The only items properly excluded from computation of the finance charge include fees and charges to be paid to public officials, non-filing fees and taxes, none of which are applicable here. *See*, 15 U.S.C. § 1605 (d).

33. Regulation Z defines the finance charge as follows:

> [T]he amount of the finance charge in connection with any transaction shall be determined as a sum of all

> charges, payable directly or indirectly by the customer, and imposed, directly or indirectly, by the creditor as an incident to or as a condition of the extension of credit[.]

See, 12 C.F.R. § 226.4 (w).

34. The defendants allowed the named plaintiff to make charges and/or assessed the named plaintiff charges that allowed her balance to exceed her credit limit of two thousand dollars ($2000.00). Similarly, the defendants allowed each and every putative class member to exceed his or her applicable credit limit.

35. By allowing the named plaintiff and each and every putative class member to exceed their applicable credit limit, the defendants made an additional extension of credit to said consumers over and above the alleged "credit limit." As a condition of this additional extension of credit, the defendants systematically impose an "over limit charge assessment" or "over limit fee" for each month the customer's balance exceeds the original credit limit. This assessment or fee is incident to or a condition of the additional extension of credit over and above the customer's alleged credit limit.

36. The defendants routinely exclude this additional assessment or fee from the amount disclosed to the customer as part of the finance charge on the standardized monthly billing statement. Instead, the defendants represent to the customer that the annual percentage rate is the percentage rate originally disclosed to the customer when, in fact, said rate is significantly greater in light of the substantial additional charge assessed via the "over limit charge assessment" or "over limit fee."

37. The defendants systematically post the "over limit charge assessment" or "over limit fee" as a new purchase or other debit on the consumer's monthly billing statement. As such, this additional fee is included in the amount on which

the monthly finance charge is calculated. Thus, the customer is being charged twice for the additional extension of credit.

38. By failing to disclose the "over limit charge assessment" or "over limit fee" as part of the finance charge and by including said fee in the amount on which the monthly finance charge is calculated, the defendants grossly misstate and/or misrepresent the true cost of credit to the consumer.

39. The defendants have misstated and/or misrepresented the true cost of credit to the named plaintiff and all other Class members by systematically failing to disclose an accurate finance charge in violation of the purpose and express disclosure requirements of TILA.

40. The named plaintiff and all other Class members herein have suffered actual damages as a result of the defendants' violation of TILA. The defendants are liable to these plaintiffs for actual damages in an amount to be proved at trial, plus attorneys' fees and costs herein, pursuant to 15 U.S.C. § 1640 (a).

WHEREFORE, the named plaintiff, Sharon R. Pfennig, prays for judgment in her favor and in favor of the Class and against the defendants, Household Credit Services, Inc. and MBNA America Bank, N.A., and for the following relief:

(a) an order certifying the putative Class pursuant to Federal Rule of Civil Procedure 23(b)(2) and, additionally or in the alternative, an order certifying the Class pursuant to Federal Rule of Civil Procedure 23(b)(3);

(b) a declaration that TILA requires the "over limit charge assessment" or "over limit fee" imposed by the defendants upon customers who are permitted to exceed their applicable credit limit be disclosed as part of the finance charge;

(c) a declaration that the defendants' systematic and standard policy of misrepresenting the finance charge

associated with a credit card issued by the defendants violates TILA;

(d) an injunction permanently prohibiting the defendants from engaging in the conduct described herein;

(e) an award of statutory damages as provided for in 15 U.S.C. § 1640(a)(2);

(f) an award of actual damages in excess of Twenty-Five Thousand and no/100 Dollars ($25,000.00);

(g) an award of attorney's and expert's fees, costs and disbursements to the fullest extent permitted under 15 U.S.C. § 1640 (a)(3) and federal law; and

(h) such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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JURY DEMAND

PLAINTIFF DEMANDS A TRIAL TO A JURY ON ALL ISSUES SO TRIABLE.

DATED this 24th day of August, 1999.

Joseph F. Murray, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-4213

SHARON R. PFENNIG,

Plaintiff-Appellant,

v.

HOUSEHOLD CREDIT SERVICES, INC. and
MBNA AMERICA BANK, N.A.,
Defendants-Appellees.

BRIEF FOR BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

This is a case of exceptional importance in that the panel decision nullifies an agency rule that implements a complex statute affecting creditors and consumers nationwide. The case is likely to affect the credit card industry in circumstances that are much broader than the facts cited by the panel majority. As a result of the decision, differing and conflicting standards will apply in an area in which uniform disclosure of credit costs is of utmost importance in effectuating the purposes of the statute in question. Pursuant to Federal Rule of Appellate Procedure 29, the Board of Governors of the Federal Reserve System (the "Board") respectfully submits this brief *amicus curiae* in support of rehearing of the panel decision.

STATEMENT

On April 11, 2002, a divided panel of this Court issued its Opinion in this case. The opinion invalidated a provision of the Board's Regulation Z, 12 C.F.R. Part 226, implementing the Truth in Lending Act ("TILA"). TILA promotes informed use of consumer credit by providing uniform disclosures to consumers about the costs and terms of consumer credit. Specifically, Regulation Z requires credit card issuers to disclose the cost of credit as a dollar amount, known as the "finance charge," and as an annual percentage rate. Since 1981, Regulation Z has specifically excluded from the definition of "finance charge" any fees imposed on a consumer for exceeding the credit limit established by the issuer. 12 C.F.R. § 226.4(c)(2).

Based on the facts alleged in the plaintiff's complaint, the panel majority held that "Regulation Z's exclusion of over-limit fees, such as those imposed in this case, from the 'finance charge' conflicts with the express language of TILA" and thus that "the regulation cannot stand." Slip Op. at 11. The majority found that an over-limit fee is a fee "incident to the extension of credit" for purposes of the TILA definition of "finance charge." The dissenting judge disagreed that the language of TILA expressly requires inclusion of over-limit fees as part of the finance charge, and would have deferred to the Board's interpretation of the statute, as expressed in Regulation Z, in accordance with Supreme Court precedent holding that such interpretations are dispositive unless "demonstrably irrational." Slip Op. at 20, citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980); *see also*, *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 219 (1981) ("absent some obvious repugnance to the statute, the Board's regulation implementing [TILA] should be accepted by the courts."). The Board was not a party to the case below, and was unaware until it learned of the April 11 decision that the validity of this portion of Regulation Z was at issue.

ARGUMENT

The Board believes that this matter presents an exceptionally strong case for rehearing or rehearing *en banc*. The panel decision erred as a matter of law in a number of respects.

1. *First*, the decision was based, in part, on a determination that the language of TILA "unambiguously" requires inclusion of over-limit fees in the finance charge. This is error. TILA defines a "finance charge" to include all charges imposed on the consumer by the creditor "as an incident to the extension of credit." 15 U.S.C. § 1605(a). However, TILA expressly contemplates that in addition to "finance charges," an open-end credit plan may impose "other charges" that must be disclosed separately. *See* 15 U.S.C. § 1637(a)(5). Thus, not every fee associated with the credit plan is considered a charge "incident to the extension of credit." Moreover, nothing in TILA explicitly requires the finance charge to include fees, such as over-limit fees, imposed when a consumer violates the credit agreement with the issuer. The same section of Regulation Z that excludes over-limit fees from the finance charge also excludes other fees for violations of the account agreement, such as late fees and default fees. These fees could also be viewed as being imposed incident to the extension of credit, because, absent the extension of credit, none of them would be incurred. However, despite the seemingly all-inclusive definition of "finance charge" in TILA, even the panel majority accepted the view that these fees were properly excluded from the finance charge disclosure. Slip Op. at 12. The Board's decision to exclude from the finance charge fees generally associated with acts of default under the credit contract, including over-limit fees, does not conflict with the plain language of the TILA definition of "finance charge."

2. *Second*, because the statutory language defining "finance charge" is ambiguous as applied to particular types of credit-related fees, the panel decision erred by substituting

its interpretation of TILA for that of the agency authorized to interpret the statute. The Board's rule excluding over-limit fees from the finance charge is based on the rational assumption that the fees are imposed when the consumer uses the credit plan in a manner that violates the terms of the plan. Based on the rule, consumers can use uniform disclosures to compare the cost of credit card programs offered by different creditors that do not account for contingent costs that may be imposed under each plan for unanticipated events such as late payments or over-limit situations.[1]

Because the statute does not explicitly deal with the treatment of over-limit fees, the panel should have deferred to the Board's rule, which rationally excludes the fees from the finance charge. In unusually expansive language, TILA grants to the Board authority to "prescribe regulations to carry out the purposes of this title [which] may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604(a). The Supreme Court has recognized that "because of their complexity and variety, . . . credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit." *Milhollin, supra*, 444 U.S. at 560. For that reason, *"deference is especially aSppropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably*

[1] Regulation Z requires fees that are charged for exceeding a credit limit to be disclosed at account-opening and on periodic statements as "other charges" imposed under the credit plan. 12 C.F.R. §§ 226.6(b), 226.7(h).

irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive." Id. at 565.[2]

Instead of following this Supreme Court directive and reviewing the regulatory provision under the deferential standard applied in such cases, the panel undertook its own review of the statute and identified its own rule of decision: that "TILA must be interpreted liberally in Plaintiff's favor in the instant case." Slip Op. at 9. On that basis, it determined that the statutory language should be *read* to include over-limit fees as included in the finance charge. This analysis usurped the deference that should have been given to the Board in interpreting the complex statutory provisions in the light of industry practices and the purposes of the statute.[3]

3. *Third*, in reaching its own interpretation of the statute, the panel majority erred in finding that the over-limit fee allegedly imposed in this case and that is referred to in Regulation Z was necessarily imposed "as an incident to the extension of credit" within the TILA definition of "finance charge." In particular, the panel majority erred in assuming

[2] In addition, TILA expressly gives immunity to creditors that rely in "good faith" on interpretations of TILA by the Board even if the interpretations are later held to be invalid by a court. 15 U.S.C. § 1640(f). The Supreme Court has indicated that this "statutory provision signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative." *Milhollin, supra*, 444 U.S. at 568-69.

[3] *Milhollin* held that courts should defer to unofficial Board *staff opinions* interpreting the statute and the Board's Regulation Z unless those interpretations are "demonstrably irrational." Quite obviously, the degree of deference due to the regulation itself, which was promulgated by the Board pursuant to the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, is at least as great.

that merely because the creditor allegedly authorized a proposed credit transaction that ultimately contributed to the account balance exceeding the cardholder's pre-approved credit limit, the creditor in effect had "renegotiated the [credit card] agreement" and "knowingly" agreed to extend additional credit to the cardholder in excess of the prior limit in return for the fee. Slip Op. at 11 and 14 n.4.[4]

This erroneous conclusion causes the panel's decision to cover a standard industry practice that protects consumers and creditors against fraud and loss but that does not involve any intention by the parties to "renegotiate" the credit limit originally set by the creditor on the basis of its determination of the consumer's risk profile.[5] Many card issuers participate in a system that allows the merchant to obtain an authorization for specific credit card transactions. This process allows the merchant to check whether the card is stolen, the account has been terminated, or transactions in the account have been blocked due, for example, to fraudulent

[4] The complaint does not even allege that the credit limit was the product of any negotiation with the issuer. Indeed, the factual allegations in the complaint conform to industry practice in which the credit limit is established unilaterally by the issuer. *See* Complaint § 6 ("defendants have a uniform policy of assigning a credit limit to all credit cards issued to consumers in their normal course of business.").

[5] The case was decided on a motion to dismiss, so all of plaintiffs allegations were assumed to be true. None of those allegations, however, suggested that the issuer actually agreed to an increase in the credit limit when it authorized a particular transaction. Indeed, the complaint alleged that fees are charged "each and every month during which the consumer's balance exceeds the alleged 'credit limit.'" Complaint ¶ 8. If anything, this suggests that from the creditor's viewpoint the credit limit continued to be the amount originally set by the creditor.

use of the card. The review is handled electronically and virtually instantaneously.

One part, but only one part, of this review involves a check on the amount of outstanding charges on the account and the overall credit limit on the account, and a comparison of those figures to the amount identified by the merchant as relating to the transaction at issue. This part of the database check may suggest that the transaction would cause the consumer's balance to exceed his or her pre-set credit limit. Importantly, however, it cannot be determined with complete accuracy at this point whether the account balance actually exceeds the credit limit, for a number of reasons. First, credits to the consumer's account are not posted until the end of the day. Thus, for example, a transaction that appears to push the account balance over the credit limit at 4:00 p.m. may turn out to have no such effect when a payment reducing the account balance is posted later that day.[6] Second, in many cases, instead of seeking authorization for the actual transaction amount, a merchant will send in a request for a nominal amount simply in order to determine whether the consumer has a "live" card.[7] In such a case, the actual transaction may cause the account balance to exceed the credit limit even though the authorization request gave the issuer no notice of that possibility. Third, in some cases, such as hotel or car rental charges, merchants can "block" large amounts of credit on check-in to ensure that the charge will be authorized when the consumer checks out and pays,

[6] In fact, the situation is even more complex because payments must be posted to an account "as of" the day they are received, even if it takes a few days for the creditor to process the payment. Regulation Z, 12 C.F.R. § 226.10(a).

[7] The issuer generally bears the credit risk as a practical matter, so the merchant may be less concerned with whether the consumer will pay the credit card bill than with whether the issuer will pay the merchant.

making an account look substantially closer to its credit limit than it in fact is.

Because the database check includes inaccuracies such as these, creditors generally do not deny authorization on the mere suspicion that a transaction would cause the account balance to exceed the consumer's credit limit. Nor is it feasible to impose the over-limit fee at the time of the particular transaction that may have that effect. Rather, card issuers typically determine whether to impose the fee only at the end of the billing cycle, when it can be determined that all charges and credits to the account establish that the consumer is in fact over the credit limit, and when other factors, such as the consumer's payment history, the amount by which the limit is exceeded, and whether the limit has been exceeded in the past, for example, may be taken into account. Only then—when the issuer is in a position to know whether the cardholder's credit behavior gives rise to the credit risk concerns that the over-limit fee is designed to address—will the issuer typically impose the charge.

Thus, over-limit fees are generally imposed only when consumers actually exceed the pre-established credit limit for some period of time, in order to impose discipline on consumer credit usage and to compensate the creditor for the added credit risk involved. The fact that a creditor authorizes a transaction that may ultimately cause the account balance to exceed the credit limit does not evidence a "willingness to renegotiate the agreement," as the panel erroneously assumed (Slip Op. at 11), and does not result in a revised credit limit going forward.[8] Nor is the over-limit fee rightly

[8] To be sure, there may be circumstances in which a course of dealing between card issuer and consumer could lead to the conclusion that a charge denominated as an over-limit fee is in fact an expected charge for extending credit itself. For example, a creditor that issues a card with an extraordinarily low credit limit and routinely allows the consumer to keep on charging above that

(continued. . .)

seen as imposed in connection with a specific extension of credit. Rather, because it is generally applied well after-the-fact on the basis of a backward look at the account some time after the particular over-limit transaction was made, and because it is imposed to affect consumer behavior to comply with the requirements of the credit agreement, the over-limit fee is more akin to other charges—such as late fees—that are not finance charges because they are not incident to a particular extension of credit. *See* 12 C.F.R. § 226.4(c)(2).

4. *Fourth*, the Board believes that the issue raised by the panel majority is one of exceptional importance given the practical implications of the panel's ruling. Regulation Z is a highly complex and technical regulation that applies to credit card issuers operating nationwide card programs. For this reason, uniform rules are of paramount importance. *See Milhollin*, *supra*, 444 U.S. at 568 (legislative history of TILA reflects "a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation."). The panel decision, if permitted to stand, would create serious difficulties for national credit card companies that would comply with the language of Regulation Z outside of the Sixth Circuit and must comply with the separate rule adopted by the panel within the Sixth Circuit.[9] Even within the Sixth Circuit alone,

(. . . continued)
limit even after over-limit fees have been assessed repeatedly may be using the fee as a substitute for finance charges. No such course of dealing was alleged in this case. Even if it were, it would provide no basis to invalidate the Board's rule, but would simply allow the consumer to argue that the charge imposed was not legitimately an over-limit charge exempt from the finance charge under § 226.4(c)(2), but was actually simply an anticipated cost of the credit extension and therefore a finance charge under § 226.4(a).

[9] A creditor attempting to comply with the panel's view of TILA's requirements nationwide would run the risk that a court

(continued. . .)

compliance could cause substantial confusion on the part of consumers, because under the rule enunciated by the panel, some over-limit fees would be included in, and disclosed as, finance charges while others would not.[10]

The only way to reconcile the conflicting requirements of the Sixth Circuit rule and the rule that exists elsewhere in the country would be to stop charging over-limit fees altogether, or to refuse to authorize any transaction that might be determined later to exceed the credit limit. The first option would eliminate for creditors an important tool for ensuring consumer discipline in the use of credit and mitigating credit risk, while the second would not only unnecessarily inconvenience large numbers of consumers, but would undoubtedly lead to contract or other claims for unwarranted denials of credit.

CONCLUSION

For all of these reasons, the Board believes that the panel decision should be reconsidered by the full Court sitting *en*

(. . . continued)
outside this jurisdiction would require it to comply with Regulation Z as written. A creditor that complies with the Sixth Circuit's decision outside the Sixth Circuit would not be entitled to the "good faith defense" authorized by TILA, because that defense only applies to compliance with the Board's regulations. TILA, 15 U.S.C. § 1640(a). *Hamilton v. Southern Discount Co.*, 656 F.2d 150, 152 (5th Cir. 1981).

[10] Moreover, a creditor could not simply decide to treat *all* over-limit fees as finance charges, because Regulation Z, with which the creditor is legally obligated to comply, provides that the finance charge does not include such fees, and the only exception to this requirement is the panel's rule relating to situations where the creditor "knowingly permits the cardholder to exceed his or her credit limit [by authorizing the transaction] and then imposes a fee." Slip Op. at 14 n.4.

banc, and that the judgment of the district court should be affirmed.

Respectfully submitted,.

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